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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. FRANK AHUMADA, JR., and ALFRED ROLDAN, Defendants and Appellants.	G040663 (Super. Ct. No. RIF116523) O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, David E. Power, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed in part, reversed in part. Remanded for resentencing as to Alfred Roldan only.

Patrick Morgan Ford, under appointment by the Court of Appeal, for Defendant and Appellant Frank Ahumada, Jr.

Athena Shudde, under appointment by the Court of Appeal for Defendant and Appellant Alfred Roland.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting and Theodore M. Cropley, Deputy Attorneys General, for Plaintiff and Respondent.

This case relates to two robberies committed on consecutive days by defendant Alfred Roldan. During the second, in which defendant Frank Ahumada, Jr., also participated, a store clerk was shot in the hand. Roldan and Ahumada (collectively defendants) allege numerous errors relating to the joinder of the cases, the admissibility of evidence, the sufficiency of the evidence, jury instructions, and sentencing. We find one of Roldan's arguments to have merit and remand his case for resentencing. In all other respects, the judgment is affirmed.

I

FACTS

On January 18, 2004, Adam Sappenfield was sitting in a car with his friends Johnny Shuben and Craig Chambers. They were parked near a park in Corona. Sappenfield was sitting in the driver's seat when he was approached by three individuals, apparently teenagers or young adults. One of them was later identified as Roldan, who tapped on Sappenfield's window. Sappenfield was talking on his cell phone at the time. When Sappenfield cracked opened the window, Roldan asked if Sappenfield had any marijuana. Sappenfield said no, and Roldan pulled out a weapon, placing it in the window, and ordered Sappenfield to give Roldan his cell phone. After taking the cell phone, Roldan asked for money. Sappenfield said he did not have any, and Roldan and the two men with him fled.

Sappenfield called his mother, who called 911. He described the assailants as three Hispanic males with shaved heads.

The next evening, Roldan and Ahumada entered a store in Corona, the Corona Discount Place. They wore black pants and black sweatshirts with the hoods pulled up. The clerk, Arif Arif recognized them as regular customers. Arif also recognized Ahumada as having a distinctive raspy voice.

Ahumada approached the clerk, pulled a gun out, and said that they wanted the money. Roldan also had a gun, and between them, Arif was trapped in the cash register area. Arif pulled approximately $300 out of the cash register and handed it to Roldan. Ahumada demanded more money, and Arif responded by handing over the remaining cash from the register, an additional $200 or so. The robbers continued demanding more, including the money in Arif's wallet, also approximately $200.

Defendants continued demanding more money, and at that point, Arif did not know what to do. Standing with his right hand toward the cash register, Ahumada shot Arif, striking his hand. Defendants fled, and Arif called the police. The bullet went through Arif's hand, and continues to cause him problems.

A few days after the robbery, Arif identified Ahumada in a photo lineup. A search warrant was issued for Ahumada's residence. While Ahumada was not there, Roldan was present with two members of the Corona Vario Locos (CVL) street gang. The police also found two rifles, several BB guns,a cell phone that included what were described as gang photos, and other photographs of purported gang members. The cell phone had an external display showing "Crown Town," which police described as a synonym for CVL. Graffiti the police described as CVL-related was also found on and near the property.

After the search was executed, Arif identified one of the rifles as the one used during the robbery. Arif later identified Roldan from a photo lineup as the second robber.

Sometime later, Sappenfield identified Roldan from a photo lineup as the person who robbed him. He also identified the cell phone found at Ahumada's residence as the one taken from him during the robbery, and the police matched the serial numbers.

Ahumada had admitted to the police on several occasions prior to these incidents that he belonged to CVL and one of its cliques, Matadores. Ahumada's gang

moniker was "Wispers." He had several tattoos associated with the gang. Roldan had also admitted to the police on a prior occasion that he was a member of CVL.

In an amended information, both defendants were charged with the robbery of Arif (count one, Pen. Code § 211);[1] assault with a firearm on Arif (count two, § 245, subd. (a)(2)); and unlawful participation in a criminal street gang (count three, § 186.22, subd. (a)). Roldan was also charged relating to the Sappenfield incident with robbery (count four) and unlawful participation in a criminal street gang (count five). Defendants were also charged with numerous enhancements, which will be discussed below as pertinent.

Over the objections of defendants' counsel, the court ordered that the charges stemming from the Sappenfield and Arif robberies be consolidated for trial. During trial, Detective Daniel Bloomfield of the Corona Police Department testified as the prosecution's gang expert. He was familiar with CVL as the main Hispanic street gang in Corona. Bloomfield testified about gang hierarchy and organization, and stated that a gang's primary purpose is criminal conduct that results in respect or money for the gang, including robberies. He also testified about respect within a gang, which was based on fear and control.

In Bloomfield's opinion, CVL was a criminal street gang and both defendants were CVL members. He opined that the Arif robbery would gain respect for the perpetrators and money for use by the gang, though he admitted on cross-examination that he had no evidence where the money from the robbery actually went. He believed that this type of robbery would benefit the gang because the fact that the perpetrators shot the victim after the completion of the robbery would instill fear in the community.

[1] Subsequent statutory references are to the Penal Code unless otherwise indicated.

The defense's gang expert, Dr. Lewis Yablonsky, testified that Roldan was only a "marginal" gang member and that neither of the robberies was committed for the benefit of a gang.

At the conclusion of trial, defendants were found guilty on all counts and the jury found the enhancement allegations true. Roldan was subsequently sentenced to an aggregate prison term of 43 years seven months to life. Ahumada was sentenced to an aggregate term of 38 years to life. Defendants now appeal.

II

DISCUSSION

Joinder (Ahumada)

Originally, two separate informations were filed with respect to the Arif and Sappenfield robberies. At the hearing on the prosecution's motion to consolidate the cases, the trial court stated that the following factors weighed in favor of the motion: the legislative preference to try cases together, the offenses were of the same class, the crimes took place a day apart and looked like a "series of crimes," and because it saw no showing of prejudice. Ahumada's attorney argued that his client would be prejudiced because the jury would infer involvement in the Sappenfield robbery based on "guilt by association." Counsel argued that the cases should not be consolidated because they involved two separate robberies with different victims, and Ahumada was only involved in one of them. Ahumada now objects to the trial court's decision to consolidate the cases for trial, arguing that his rights to due process and fair trial were violated as a result.

Section 1098 states in part: "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials." We review the trial court's decision for abuse of discretion, judged on the facts as they appeared at the time of the ruling. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 41 (*Coffman*).)

Generally, "Joint trials are favored because they 'promote [economy and] efficiency' and '"serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts."' [Citation.]" (*Coffman, supra,* 34 Cal.4th at p. 40.) "The court's discretion in ruling on a severance motion is guided by the nonexclusive factors . . . such that severance may be appropriate 'in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony.'" (*Ibid.*)

Ahumada's key argument here is that he was prejudiced by association because Roldan was charged with an additional robbery, and Ahumada feared the jurors might believe he was involved in that incident. There was no showing at the time of the court's decision, however, that this was indeed the case. Evidence regarding the Sappenfield robbery might well have been admissible in a separate trial on the Arif robbery because of the charged gang enhancements. Further, the jury was properly instructed that it must consider evidence as it applied to each defendant separately. There was no basis for the trial court to believe the jury would disregard such an instruction, and no evidence that they actually did so. We presume that juries understand and follow instructions. (*Coffman, supra,* 34 Cal.4th at p. 83.) In sum, we find no abuse of discretion.

Ahumada's Statement – Miranda Waiver and Voluntariness (Ahumada)

Ahumada next argues that any waiver of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) and subsequent statements to the police were involuntary. He also argues that his counsel was ineffective for failing to raise this issue at trial. In sum, Ahumada claims that his *Miranda* waiver was the product of improper "softening up" and a promise to protect him, rendering his statement involuntary.

Ahumada was arrested on August 7, 2004. Following his arrest, he was questioned by Bloomfield and Detective Robert Newman. At the beginning of the interview, the detectives gave him water and asked if he had had a chance to talk to his family. There was small talk about Ahumada's family, as Bloomfield apparently knew Ahumada from prior contacts. Bloomfield said: "I know the last couple times I've talked to [Ahumada's grandmother] she wasn't real happy. It didn't look too good. I know they're concerned and I'm trying to protect you and stuff. And at the same time, they don't want nothing to happen . . . to you, you know." After some further talk, Bloomfield began asking Ahumada about his name, birth date, and address. Bloomfield also asked about Ahumada's tattoos and about his daughter.

Ahumada then acknowledged that another officer had already read him his rights. Bloomfield then said: "I guess I'll stop talking now. I'm gonna read 'em to you again since you're still in custody, obviously. And you told me that, uh, when he read 'em to you and asked if you wanted to talk, you said there's nothing really to talk about. Is that right? And then when I was downstairs a little while ago peeking in 'cause I'd heard you'd been arrested, uh, you wanted to talk to me, right?" Ahumada replied: "I was — what happened — and I shot him, and . . ." Bloomfield stated: "Okay, all right. I'll go ahead and read these, read these to you again, all right[?]"

Bloomfield then proceeded to read Ahumada his rights pursuant to *Miranda*, and Ahumada said he understood each right. At the conclusion, Ahumada signed a form stating that his rights were read and that he understood them. Bloomfield then asked if Ahumada knew what he was investigating, and Ahumada said that he did. Bloomfield then proceeded to question Ahumada about the Arif robbery, but the only statement that Ahumada made during the interview that was introduced at trial was the admission that he was a gang member.

Ahumada's argument, as he describes it, is that "the interrogating officers engaged [Ahumada] in small talk about his mother, baby and friends as a 'softening up technique'" that made any waiver of his *Miranda* rights involuntary. Thus, he essentially concedes the question of whether there was an implied *Miranda* waiver, but argues that the waiver itself was involuntary.

The state must demonstrate the defendant's statement was voluntary by a preponderance of the evidence. (*People v. Weaver* (2001) 26 Cal.4th 876, 920.) "On appeal, the trial court's findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence, but the trial court's finding as to the voluntariness of the confession is subject to independent review. [Citations.]" (*People v. Massie* (1998) 19 Cal.4th 550, 576.) "In determining whether a confession was voluntary, '[t]he question is whether defendant's choice to confess was not "essentially free" because his will was overborne.' [Citation.]" (*People v. Massie, supra,* 19 Cal.4th at p. 576.)

Ahumada relies on a handful of cases in which "ingratiating conversation" was used as a method of "softening up" a suspect. The cited cases, however, discuss facts that go far beyond what occurred here. In *People v. Esqueda* (1993) 17 Cal.App.4th 1450, for example, the court described the defendant's statement as "the product of outrageous police behavior. After lengthy and unlawful pre-*Miranda* questioning, the police, using lies, trickery and threats, coerced a 'waiver' of Esqueda's *Miranda* rights." (*Id.* at p. 1484, fn. omitted.) In *People v. Honeycutt* (1977) 20 Cal.3d 150, the defendant was questioned prior to receiving *Miranda* warnings twice, first in the patrol car and again for about half an hour at the police station. The second discussion included the detective disparaging the character of the victim. (*Id.* at p. 158.)

The improper techniques present in those cases were not, as Ahumada contends, merely mentioning past events or common acquaintances, but the practice of

lengthy interrogation prior to *Miranda* warnings. Moreover, what occurred in this case was clearly brief and did not include threats, promises, or trickery designed to overbear the suspect. In sum, there is nothing to indicate that Ahumada's will was overborne in a way that would make his *Miranda* waiver of subsequent statements involuntary. (*People v. Massie, supra,* 19 Cal.4th at p. 576.)

Ahumada's claim that his trial counsel was ineffective for failing to litigate this issue is, obviously, without merit. There are no facts here to demonstrate that counsel's performance was deficient under prevailing professional norms. (*People v. Williams* (1997) 16 Cal.4th 153, 214-215.) A reasonable attorney could easily have concluded that the facts did not support any argument that Ahumada's *Miranda* waiver or statements were involuntary.

Ahumada's Statement – Exclusion (Ahumada)

The trial court granted the prosecution's motion to admit only part of Ahumada's statement to the police, and he argues this was error. Ahumada's counsel wished the jury to hear the part of the statement during which he stated that the shooting of Arif was accidental. Respondent argues that the court properly denied Ahumada's request, noting that the only part of the interview admitted was about Ahumada's gang membership, which was admitted only as a foundation for the gang expert to base his opinion on, rather than for the truth of the statement itself.

"Broadly speaking, an appellate court reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion." (*People v. Alvarez* (1996) 14 Cal.4th 155, 201.) Even where evidence has been erroneously excluded or admitted, the judgment or decision shall not be reversed unless the reviewing court believes the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; Evid. Code, §§ 353, 354.)

Ahumada confusingly combines into one argument several reasons as to why his statement should have been admitted. While we shall attempt to parse this argument below, we note that undeveloped theories may properly be considered waived. (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106.)

The only issue Ahumada's counsel raised at trial with respect to the statement's admissibility was Evidence Code section 356, which states: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence." Thus, where one party has admitted only part of a statement, this provision allows the other party to admit the rest of it to place the original statement in context. (*People v. Pride* (1992) 3 Cal.4th 195, 235.)

We find Ahumada's argument that whether the shooting was accidental provided "context" for his admission of gang membership to be unpersuasive. Specifically, his statement was that he was in a daze during the robbery, implied the shooting was accidental ("that thing went off") and that the gun he had was "Mickey Moused" and broken. Ahumada, however, makes no argument as to how any of that relates or provides context to his admission that he was a gang member, and we find none.[2]

The trial court's decision on this issue did not, as Ahumada claims, violate his Sixth Amendment right to present a defense. Excluding a single piece of evidence is not the same as completely precluding a defense. Ahumada was not precluded from presenting other evidence that the shooting was accidental, and indeed, he presented

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[2] Ahumada also argues that the statement was not hearsay, but ultimately that is not relevant, absent some error in the trial court's ruling, which was based on Evidence Code section 356, not hearsay.

enough to support a jury instruction on a lesser included firearm enhancement if the shooting was found accidental. Thus, we find the court did not err in excluding Ahumada's statement from evidence.

Sufficiency of the Evidence – Street Gang Enhancement (Ahumada)

On count one, the Arif robbery, the information alleged that defendants committed the crime "for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in any criminal gang members, within the meaning of Penal Code section 186.22, subdivision (b)." Ahumada argues there was insufficient evidence to support the gang enhancement, claiming it was a garden variety "stick-up" of a grocery store, committed without gang references in behavior or statements.

"Our role in considering an insufficiency of the evidence claim is quite limited. We do not reassess the credibility of witnesses [citation], and we review the record in the light most favorable to the judgment [citation], drawing all inferences from the evidence which supports the jury's verdict. [Citation.]" (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382.) The standard of review is the same where the prosecution relies primarily on circumstantial evidence. (*People v. Miller* (1990) 50 Cal.3d 954, 992.) Before a verdict may be set aside for insufficiency of the evidence, a party must demonstrate "'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) The same standard of review applies to section 186.22 gang enhancements. (*People v. Augborne* (2002) 104 Cal.App.4th 362, 371.)

Ahumada points to a lack of direct evidence connecting the crime with the gang, but such evidence is not required. Circumstantial and expert evidence can be sufficient. The Arif robbery took place in Corona, which, according to Bloomfield's

testimony at trial, was within CVL's claimed "turf." He also testified that the gang's primary activities included robberies and assault. According to Bloomfield, this type of robbery, committed by CVL members, would benefit the gang because the fact that the perpetrators shot the victim after the completion of the robbery would instill fear in the community. It could also, of course, be used to obtain money for the gang. Given a hypothetical describing the circumstances of the Arif robbery, Bloomfield testified that the crime fit into the category crimes intended for the benefit of a gang.

Ahumada argues that Bloomfield's opinions were "pure speculation and entirely illogical." We disagree, and find the jury could reasonably have relied upon them in reaching their decision. There were facts that supported the expert's opinion, such as two armed gang members who had been in the store before committing a robbery with no attempt to disguise their identity. A jury could reasonably infer, from those facts, that the robbery was intended to instill fear to benefit the gang. We find no error.

Admissibility of Gang Expert's Testimony (Ahumada)

Ahumada next argues that Bloomfield's testimony regarding whether the Arif robbery was committed for the benefit of CVL was improper because it addressed the "ultimate conclusion" in the case. As noted above, we review the trial court's evidentiary decisions for abuse of discretion. (*People v. Alvarez, supra,* 14 Cal.4th at p. 201.)

While acknowledging the legion of cases that have approved the use of expert testimony in gang cases, Ahumada nonetheless contends the trial court somehow went too far in this particular case. He relies in *People v. Killebrew* (2002) 103 Cal.App.4th 644 (*Killebrew*). In that case, the expert exceeded the scope of permissible expert testimony by opining about the subjective intent and knowledge of each of the gang members involved. (*Id.* at p. 658.) Specifically, he testified that each person in a

group of three cars knew about the presence of a gun in two of the cars, and that each individual therefore jointly possessed the gun for mutual protection. (*Ibid.*)

That case, obviously, is distinguishable. The expert in *Killebrew* went beyond the scope of permissible expert testimony by opining about the particular knowledge and intent of specific individuals under particular circumstances. The California Supreme Court has noted the difference, stating: "Obviously, there is a difference between testifying about specific persons and about hypothetical persons. It would be incorrect to read *Killebrew* as barring the questioning of expert witnesses through the use of hypothetical questions regarding hypothetical persons." (*People v. Gonzalez* (2006) 38 Cal.4th 932, 946, fn.3.)

This case is, therefore, distinguishable from *Killebrew* and similar to the many cases which have held that expert testimony on gang issues, including the question of whether a crime was committed for the benefit of a gang, is proper. (See, e.g., *People v. Olguin*, *supra*, 31 Cal.App.4th at p. 1371.) Ahumada's claim of error must therefore be rejected.

Multiple Firearm Enhancements (Roldan)

The amended information, with respect to the Arif robbery, alleged the personal use of a firearm by Roldan, asserting he "violated subdivision (b) of section 186.22 and was a principal and at least one principal personally and intentionally discharged a firearm and proximately caused great bodily injury . . . to another person, not an accomplice, within the meaning of Penal Code section 12022.53, subdivision (d) and subdivision (e)."[3] Roldan claims the trial court erred by "failing to instruct the jury

[3] Section 12022.53, subdivision (d) states, in relevant part: "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a) . . . personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an

on lesser included enhancements," specifically, by failing to instruct the jury how to evaluate the enhancements during deliberations and properly complete the verdict forms. He therefore claims the jury's true finding on the lesser firearm enhancement in the Arif robbery must be stricken.

During a conference on the jury instructions, Ahumada's counsel requested the jury be instructed on the lesser enhancement of personal use of a firearm pursuant to section 12022.53, subdivision (b).[4] Ahumada argued the discharge of the weapon was accidental. When the matter was revisited, Ahumada's counsel again requested the lesser instruction, and Roldan's counsel later joined in his request. Despite the prosecution's objection, the trial court found sufficient evidentiary support to instruct the jury on the lesser enhancement. Thus, the court instructed the jury as to both enhancements.

The court instructed as to the 12022.53, subdivision (d), the greater enhancement, first. Shortly thereafter, with respect to the lesser enhancement, the trial court instructed: "If you find a defendant guilty of the crimes charged in Count[] 1 . . . and you decide that a defendant did not personally and intentionally discharge a firearm during that crime causing great bodily injury, you must then decide whether the People have proved the lesser included allegation that the defendant personally used a firearm during the commission of that crime. . . ."

The jury found defendants guilty of the robbery charged in count one. They also found that *both* enhancements were true as to each defendant. The jury's

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accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life." Robbery, under section 211, is among the included offenses listed in subdivision (a).

[4] Section 12022.53, subdivision (b) states: "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), personally uses a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years. The firearm need not be operable or loaded for this enhancement to apply."

finding that both the greater and lesser enhancements were true provides the basis for Roldan's present claim of error. He argues the court failed to instruct the jury on deliberations and completion of the verdict form, and to instruct the jury that it must acquit on the greater enhancement before finding the lesser true. He claims that the failure to do so subjected him to an additional 10-year sentence and the true finding on the lesser enhancement must be vacated. Roldan also contends that he was provided with ineffective assistance of counsel with respect to this matter.

Roldan was *not* sentenced to additional prison time as the result of the jury's finding that both enhancements were true. The court imposed and stayed the 10-year sentence on the lesser enhancement while imposing the additional 25-year sentence on the greater. This is the proper procedure. (*People v. Gonzalez* (2008) 43 Cal.4th 1118, 1130.)

Roldan acknowledges this, and does not claim the court sentenced him to an additional 10 years on the section 12022.53, subdivision (b) enhancement directly. He instead points to section 12022.53, subdivision (e)(2), which states: "An enhancement for participation in a criminal street gang pursuant to Chapter 11. . . shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense." Roldan was sentenced to a consecutive 10-year term under section 186.22, subdivision (b). He argues that if his only liability is vicarious under the greater enhancement, then section 12022.53, subdivision (e)(2) does not apply and he only received an additional 10-year sentence because of the jury's finding on the lesser enhancement.

We agree. The jury's finding on the greater enhancement stated only that Roldan was a principal and that a principal did discharge a firearm, causing great bodily injury. In *People v. Salas* (2001) 89 Cal.App.4th 1275, 1281-1282, the court reversed a

minimum parole eligibility term which had been based on section 12022.53, subdivision (e)(2), where the jury had not reached a finding that the defendant had personally used a firearm. The same principle applies here.

Thus, the question here is whether the only finding that Roldan personally — rather than vicariously — used a firearm (the true finding on lesser enhancement) was the result of error. We must conclude that it was. The unusual confluence of events here, including the addition of the uncharged "lesser included" enhancement, the manner in which the jury was instructed, and the failure of the jury to follow instructions were all contributing factors in an inherently unjust outcome with respect to the additional 10-year sentence.[5]

We do not find that Roldan's counsel was ineffective for requesting the instruction at the outset. It is clear from the record that everyone — the court, the prosecutor, and both defense counsel — believed that the lesser enhancement was a lesser *included* enhancement, and could only be found true once the greater enhancement was found not true.[6] This was reflected in the language of the jury instructions: "If you find a defendant guilty of the crimes charged in Count[] 1 . . . *and you decide that a defendant did not personally and intentionally discharge a firearm during that crime* causing great bodily injury, *you must then decide* whether the People have proved the lesser included

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[5] The prosecution also erred by failing to request a separate finding on Roldan's personal use of a firearm in order to seek the enhanced sentence under section 186.22. This would have permitted the enhanced sentence under that section without the true finding under section 12022.53, subdivision (b).

[6] Respondent argues that the jury could properly have found both that Roldan personally used a firearm in addition to his vicarious liability for Ahumada's actions; thus, the lesser enhancement is not necessarily a lesser "included" enhancement in this particular case. While there was certainly substantial evidence from which the jury could find that Roldan did personally use a firearm, the jury was not instructed that it could find both allegations were true, and this was not what Roldan's defense counsel reasonably anticipated when requesting the instruction.

allegation that the defendant personally used a firearm during the commission of that crime. . . . " (Italics added.)

Thus, it was a reasonable tactical decision to request the lesser instruction. Even with the two 10-year sentences for which Roldan would be eligible if only the lesser enhancement were found true, he would nonetheless be better off than if the single greater enhancement were found true, which would result in an additional 25-year sentence. It is obvious to us that counsel did not foresee that the jury could find *both* enhancements true, which led to Roldan's eligibility for a consecutive 10-year sentence under section 186.22, subdivision (b).

That, however, is exactly what happened. The jury found true two enhancements where only one was charged. Just as there is no authority permitting a defendant to be convicted of two offenses under one count, it is inappropriate for two enhancements to be found true where only one was charged. (See, e.g., *People v. Escobar* (1996) 45 Cal.App.4th 477, 483, fn. 2; *People v. Wissenfeld* (1951) 36 Cal.2d 758, 766.)

Given the circumstances, we therefore find that the sentence was improper. We reverse the true finding under section 12022.53, subdivision (b), and remand for resentencing.

Sentencing Discretion (Roldan)

Roldan's next claim is that the trial court was unaware of its discretion with regard to the street gang enhancement under section 186.22. As this argument is rendered moot by the discussion above, we need not consider it further.

Consecutive Sentencing (Roldan)

Finally, Roldan asserts that under the line of cases beginning with *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the trial court improperly imposed a consecutive sentence based on facts that were not found by the jury or admitted by him. This argument was rejected by the California Supreme Court in *People v. Black* (2007) 41 Cal.4th 799, 820-823, and we need not consider it further.

III

DISPOSITION

With respect to Roldan, we reverse the section 12022.53, subdivision (b) enhancement as to count one, and remand for resentencing consistent with this opinion. In all other respects, the judgment is affirmed.

MOORE, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.